Assembly Bill No. 1723

Passed the Assembly August 16, 2010

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Chief Clerk of the Assembly

Passed the Senate August 11, 2010

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Secretary of the Senate

This bill was received by the Governor this _____ day of _____, 2010, at _____ o'clock ___M.

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Private Secretary of the Governor

CHAPTER _____

An act to amend Section 240 of, and to add and repeal Section 1390 of, the Evidence Code, relating to evidence.

LEGISLATIVE COUNSEL'S DIGEST

AB 1723, Lieu. Evidence: admissibility of statements.

(1) Existing law defines "unavailable as a witness," for purposes of the Evidence Code, to mean that the declarant is, among other things, exempted or precluded on the ground of privilege, disqualified, dead, or absent for a specified reason.

This bill would supplement that definition to add the circumstance that the declarant is persistent in refusing to testify concerning the subject matter of the declarant's statement despite having been found in contempt for refusal to testify.

(2) Existing law, known as the "hearsay rule," provides that, at a hearing, evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated is inadmissible. Existing law also provides exceptions to the hearsay rule to permit the admission of specified kinds of evidence.

This bill would provide, until January 1, 2016, that evidence of a statement that is offered against a party who has engaged, or aided and abetted, in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness is not made inadmissible by the hearsay rule. The bill would require the party seeking to introduce a statement to establish, by a preponderance of the evidence, that the elements of this provision have been met at a foundational hearing, as specified. These provisions would apply to any civil, criminal, or juvenile case or proceeding initiated or pending as of January 1, 2011.

The people of the State of California do enact as follows:

SECTION 1. Section 240 of the Evidence Code is amended to read:

240. (a) Except as otherwise provided in subdivision (b), "unavailable as a witness" means that the declarant is any of the following:

(1) Exempted or precluded on the ground of privilege from testifying concerning the matter to which his or her statement is relevant.

(2) Disqualified from testifying to the matter.

(3) Dead or unable to attend or to testify at the hearing because of then-existing physical or mental illness or infirmity.

(4) Absent from the hearing and the court is unable to compel his or her attendance by its process.

(5) Absent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process.

(6) Persistent in refusing to testify concerning the subject matter of the declarant's statement despite having been found in contempt for refusal to testify.

(b) A declarant is not unavailable as a witness if the exemption, preclusion, disqualification, death, inability, or absence of the declarant was brought about by the procurement or wrongdoing of the proponent of his or her statement for the purpose of preventing the declarant from attending or testifying.

(c) Expert testimony that establishes that physical or mental trauma resulting from an alleged crime has caused harm to a witness of sufficient severity that the witness is physically unable to testify or is unable to testify without suffering substantial trauma may constitute a sufficient showing of unavailability pursuant to paragraph (3) of subdivision (a). As used in this section, the term "expert" means a physician and surgeon, including a psychiatrist, or any person described by subdivision (b), (c), or (e) of Section 1010.

The introduction of evidence to establish the unavailability of a witness under this subdivision shall not be deemed procurement of unavailability, in absence of proof to the contrary.

SEC. 2. Section 1390 is added to the Evidence Code, to read:

1390. (a) Evidence of a statement is not made inadmissible by the hearsay rule if the statement is offered against a party that has engaged or aided and abetted in the wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

(b) (1) The party seeking to introduce a statement pursuant to subdivision (a) shall establish, by a preponderance of the evidence, that the elements of subdivision (a) have been met at a foundational hearing.

(2) The hearsay evidence that is the subject of the foundational hearing is admissible at the foundational hearing. However, a finding that the elements of subdivision (a) have been met shall not be based solely on the unconfronted hearsay statement of the unavailable declarant, and shall be supported by independent corroborative evidence.

(3) The foundational hearing shall be conducted outside the presence of the jury. However, if the hearing is conducted after a jury trial has begun, the judge presiding at the hearing may consider evidence already presented to the jury in deciding whether the elements of subdivision (a) have been met.

(4) In deciding whether or not to admit the statement, the judge may take into account whether it is trustworthy and reliable.

(c) This section shall apply to any civil, criminal, or juvenile case or proceeding initiated or pending as of January 1, 2011.

(d) This section shall remain in effect only until January 1, 2016, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2016, deletes or extends that date. If this section is repealed, the fact that it is repealed should it occur, shall not be deemed to give rise to any ground for an appeal or a postverdict challenge based on its use in a criminal or juvenile case or proceeding before January 1, 2016.

Approved _____, 2010

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Governor